

No. PD-0799-19

IN THE
TEXAS COURT OF CRIMINAL
APPEALS

FILED
COURT OF CRIMINAL APPEALS
10/4/2019
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**THE STATE OF TEXAS,
PETITIONER,**

v.

**SHEILA JO HARDIN,
RESPONDENT.**

ON PDR FROM THE THIRTEENTH
COURT OF APPEALS

PETITIONER'S BRIEF

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The Thirteenth Court of Appeals erred in concluding that the officer who stopped Hardin’s vehicle lacked reasonable suspicion to stop her for failing to maintain a single lane by swerving into another lane, whether or not this movement could be done safely.

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NO. PD-0799-19
(Appellate Cause No. 13-18-00244-CR)

THE STATE OF TEXAS, Petitioner,		IN THE
v.		COURT OF CRIMINAL APPEALS
SHEILA JO HARDIN, Respondent.		OF TEXAS

PETITIONER’S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the District Attorney for the 105th Judicial District of Texas, and respectfully urges this Court to reverse the judgment of the Thirteenth Court of Appeals in the above named cause for the reasons that follow:

STATEMENT OF THE CASE

Sheila Jo Hardin was charged by indictment with the felony offenses of Fraud and Forgery. (CR p. 5) She filed a motion to suppress based on lack of reasonable suspicion to conduct the traffic stop during which evidence of the offenses in question was found (CR p. 40), which the court granted on February 22, 2018. (CR p.44).

A panel of the Thirteenth Court of Appeals affirmed the trial court’s suppression order in an unpublished opinion on August 1, 2019. The State did not file a motion for rehearing.

ISSUE PRESENTED

GROUND ONE

The Thirteenth Court of Appeals erred in concluding that the officer who stopped Hardin's vehicle lacked reasonable suspicion to stop her for failing to maintain a single lane by swerving into another lane, whether or not this movement could be done safely.

STATEMENT OF FACTS

At the suppression hearing, Corpus Christi Police Officer David Alfaro, testified that he conducted a traffic stop on a vehicle (later identified as Ms. Hardin's vehicle (RR vol. 2, p. 10)) for failing to maintain a single lane of travel. (RR vol. 2, p. 5-6). Specifically, Officer Alfaro observed Hardin's vehicle's tires cross the white line and ride for a couple seconds on the other side of the lane. (RR vol. 2, p. 9) The State later played a recording of the traffic violation (RR vol. 2, p. 16), which was admitted into evidence as SX # 1. (RR vol. 2, pp. 20-21)

After granting the motion to suppress, the trial court made written findings of fact, including specifically that: "The trial court finds credible the testimony of Corpus Christi Police Officer D. Alfaro that on April 23, 2017, he observed Sheila Jo Hardin's vehicle traveling on the highway in front of him in the marked center lane of travel, and that he initiated a traffic stop for failure to maintain a single lane after he observed Hardin's tires cross over the striped lines marking the center lane without Hardin signaling a lane change, although there were no other vehicles in the vicinity at the time or any other circumstance to suggest that this movement

was unsafe.” The trial court concluded that the officer lacked reasonable suspicion to detain Hardin. (1st Supp. CR p. 15)

SUMMARY OF THE ARGUMENT

Failure to maintain a single lane, whether or not it can be done safely, is a traffic violation. Such is the only reasonable interpretation of the Transportation Code provision in question.

ARGUMENT

In its opinion affirming the trial court’s suppression order, the Thirteenth Court of Appeals effectively concluded that failing to maintain a single lane is not a traffic violation for which a motorist may be stopped unless there is also evidence that this movement was unsafe.

The Transportation Code requires that an operator on a roadway divided into two or more clearly marked lanes for traffic:

- (1) shall drive as nearly as practical entirely within a single lane; and
- (2) may not move from the lane unless that movement can be made safely.

Tex. Transp. Code § 545.060 (a).

A relatively recent plurality opinion of this Court has interpreted Section 545.060 (a) to require an operator to comply with both subsections (1) and (2), such that he must “drive as nearly as practical entirely within a single lane,” whether or not movement between lanes may be made safely. *Leming v.State*. 493 S.W.3d 552, 559-60 (Tex. Crim. App. 2016) (Part II of the *Leming* opinion gained

only four votes and is a plurality opinion). This Court further explained that failing to stay entirely within a single lane is not an offense if it is prudent to deviate to some degree to avoid colliding with an unexpected fallen branch or a cyclist who has strayed from his bike lane. *Id.*

Although plurality opinions do not constitute binding authority, they “may nevertheless be considered for any persuasive value they might have.” *Unkart v. State*, 400 S.W.3d 94, 100–01 (Tex. Crim. App. 2013). The State would suggest that the reasoning of the plurality in *Leming* is persuasive.¹ Moreover, the deciding vote on the Court of Criminal Appeals did not clearly disagree with this reasoning, but rather accepted the alternative ground which justified the stop based on suspicion of DWI.

In addition to the reasons set forth in *Leming*, the State would suggest as well the following reasons for interpreting Section 545.060 (a) to require a driver to avoid swerving into or over lane markers, regardless of whether such swerving may be done safely under the circumstances.

In construing a statute, a Court may consider among other matters the: (1) object sought to be attained; and (5) the consequences of a particular construction. Tex. Gov't Code § 311.023. In addition, the Court should presume that the Legislature intended for the entire statutory scheme to be effective. *See* Tex. Gov't

¹ The State assumes that this Court is familiar with the plurality opinion in *Leming* and sees no reason to repeat the arguments made therein.

Code § 311.021(2); *Leming v. State*, 493 S.W.3d 552, 559 (Tex. Crim. App. 2016) (Plurality Opinion); *Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012). To that end, under the doctrine of *in pari materia*, while all parts of a statutory scheme on the same or similar subject should be given effect and construed in harmony with each other, in the event of an irreconcilable conflict a more specific provision should prevail over a more general one. *See* Tex. Gov't Code § 311.026; *Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988); *State v. Schunior*, 467 S.W.3d 79, 83 (Tex. App.—San Antonio 2015), *aff'd*, 506 S.W.3d 29 (Tex. Crim. App. 2016).

A common sense reading of the present statute, and one consistent with the doctrine of *in pari materia*, would interpret Subsection (a)(1) to apply generally, and without any safe-movement exception, to all driving within a lane that does not involve changing or entirely leaving the lane in question, while Subsection (a)(2) and the safety and related signaling requirement apply only to lane changes or leaving the lane entirely.²

Specifically, the requirement in Subsection (a)(2) that a driver “may not move from the lane unless that movement can be made safely,” should be read to apply only to changing or fully leaving the lane in question, not to merely swerving

² *See* Tex. Transp. Code § 545.104 (a) (“An operator shall use the signal authorized by Section 545.106 to indicate an intention to turn, change lanes, or start from a parked position.”).

into or over the lane markers.

The State acknowledges that, whether “move from the lane” means entirely moving out of the lane and into another lane, shoulder, off-ramp, or adjacent area, or merely moving any part of the vehicle outside, across, or into the white lines dividing lanes is not entirely clear from the terms used in the statute. In the context of burglary and criminal trespass, a similar ambiguity concerning whether “enter” means a partial or entire intrusion of the body onto the property of another has been resolved by definitions specifically requiring partial intrusion for burglary, Tex. Penal Code § 30.02 (b), but intrusion of the entire body for criminal trespass. Tex. Penal Code § 30.05 (b)(1). No such definition is provided in the Transportation Code for “move from the lane,” and the ambiguity remains concerning whether the phrase requires movement of the entire vehicle out of the lane in question, or merely movement of any part of the vehicle into or across the dividing lines.

However, common sense and the statutory scheme clearly suggest that Subsection (a)(2) should apply only to the equivalent of a lane change.

If taken literally and applying both subsections to the same driving behavior, the statute would suggest that a driver may never move from his lane unless both (1) it is impractical to stay in his lane for some reason *and* (2) movement from the lane can be made safely. But, this begs the question of when it would become impractical to remain in a single lane. Surely, when the driver wishes to change lanes, it may still be “practical” for him to remain in the lane of travel, but does

this mean that he may never change lanes until some circumstance actually requires him to do so? (*e.g.*, when he is in danger of running out of gas or the lane itself ends or merges)? This would be an absurd reading of the statute. A common sense reading, however, suggests that the requirement to drive within a single lane applies to the more general behavior of driving down the highway when no lane change is intended, while the separate requirements for safe movement from the lane and signaling apply to the more specific behavior of turning into another lane or portion of the highway.

In addition, drivers who are changing lanes might be expected to determine beforehand whether the lane change will be safe. However, drivers swerve between lanes because they are not being careful and attentive in the first place. There is no logical reason to encourage this behavior and it would be absurd to ascribe a statutory intent to allow drivers to be careless and swerve between lanes, but only so long as they do so safely. The prior version of the statute is illuminating in this regard, as it provided that “The driver of a vehicle shall drive as nearly as practical entirely within a single lane and shall not be moved from one such lane *until the driver has first ascertained that such a movement can be made with safety.*” Tex. Rev. Civ. Stat. Article 6701d, § 60(a); Acts 1947, 50th Leg., ch. 421, § 60, p. 978 (“Uniform Act Regulating Traffic on Highways”) (emphasis added). Common sense suggests that swerving within and between lanes is not planned driving behavior and it would be absurd to suggest that a driver may swerve in this

manner if he has “first ascertained that such a movement can be made safely.” Changing lanes, on the other hand, is exactly the sort of planned behavior to which this portion of the statute logically applies.

Finally, the object sought to be obtained is the safe movement of traffic, but the majority of the rules of the road do not allow for subjective determinations about safe movement. The requirements that a driver stop at a stop sign or red light make no provision for disregarding those devices even if the driver determines it can be done safely. Likewise, lines are painted to divide the lanes for a purpose, and drivers are expected to abide by those lanes as best they can, and not to disregard them simply because they think it can be done safely. The opposing construction would turn the lane markings into little more than suggestions rather than directives. Moreover, the requirement for signaling an intention to change lanes would also be rendered largely meaningless if a driver could swerve back and forth across lanes without signaling.

The Texas Driver Handbook supports this interpretation as well (See Appendix I).

In the past, this Court has considered the instructions in the Texas Driver Handbook as representing an administrative determination concerning otherwise ambiguous provisions in the Transportation Code. *See Mahaffey v. State*, 316 S.W.3d 633, 641 (Tex. Crim. App. 2010).

Accordingly, the State would point to Chapter 5: Signals, Signs, and Markers,

which provides in pertinent part, as follows:

Multi-lane Highway (Four or More Lanes)

Do not cross the double yellow line to pass. Stay in your lane as much as possible. If you are driving slower, keep in the right-hand lane.

Texas Driver Handbook, p. 36. Notably absent is any indication that the obligation to “Stay in your lane as much as possible” only applies when it would be unsafe to swerve or drift into another lane. The Handbook goes on to say:

Solid and Broken Lines

A solid yellow line on your side of the road marks a “no-passing zone.” Broken or dashed lines permit you to pass or change lanes, if safe.

Texas Driver Handbook, p. 36. Notably present in this admonishment concerning passing or changing lanes is the “if safe” qualification. In other words, the fact that the Texas Driver Handbook includes the “if safe” qualification for passing and changing lanes, but not in connection with the general obligation to remain within a single lane, suggests that it applies only to the former type of movement.

In addition Chapter 6: Signaling, Passing, and Turning, provides in pertinent part as follows:

Signaling

A good driver always lets others know if he/she is going to turn or stop. Signaling communicates your intention when driving and helps other drivers around you to plan ahead. A surprise move often results in a crash. Always be alert, watch for others, and give signals for your movements.

Always signal when you are going to:

1. Change lanes

....

Texas Driver Handbook, p. 41. This admonishment against any “surprise move,”

and about the importance of signaling any “movement” further suggests that the State is correct in its interpretation of the Transportation Code to require drivers to avoid unsignaled “movements” out of their lanes, even when it might otherwise be done safely.

For all of these reasons, the Subsection (a)(1) requirement for an operator to drive as nearly as practical entirely within a single lane should not be read as subject to a Subsection (a)(2) safe movement exception in the absence of a complete and properly signaled lane change.

PRAYER FOR RELIEF

For the foregoing reasons, the State requests that this Court reverse the judgment of the Thirteenth Court of Appeals and remand to that Court for proceedings consistent with the opinion.

Respectfully submitted,

/s/ *Douglas K. Norman*

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RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 2,088.

/s/ Douglas K. Norman

Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that, pursuant to Tex. R. App. P. 6.3 (a), copies of this brief were e-served on October 4, 2019, on Respondent's attorney, Mr. Donald B. Edwards, at mxlplk@swbell.net, and on the State Prosecuting Attorney, at Stacey.Goldstein@SPA.texas.gov.

/s/ Douglas K. Norman

Douglas K. Norman

APPENDIX I.
Texas Driver
Handbook
Excerpts



Texas Driver Handbook



Driver License Division
Revised September 2017

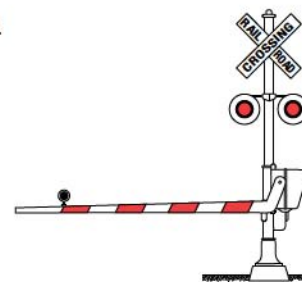
This publication is FREE

Gate and Flashing Light

Stop when the lights begin to flash before the gate lowers across your side of the road. Remain stopped until the gates are raised and the lights stop flashing.

At railroad crossings stop within 15 feet to 50 feet of the nearest rail when:

1. You are directed to do so by a flag person
2. There are flashing red lights or warning bells sounding
3. There is any warning device telling you a train is coming

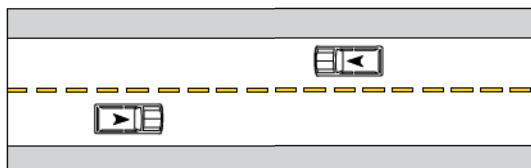


Pavement Markings

Pavement markings help you just like signs and signals. They are used to warn and direct drivers and to regulate traffic.

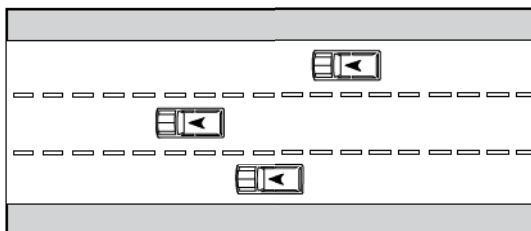
Two-Lane Rural Road with Two-Way Traffic

Keep to the right of the yellow center line. You may cross a broken line when passing another vehicle or when the right half of the road is closed. Do not cross the line if it is not safe or it is a solid yellow line.



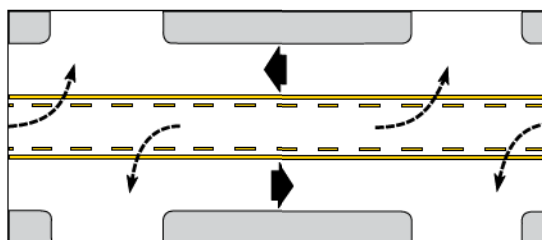
Three Lane One-Way Roads

When each lane on a one way road is marked with a broken white line, you may drive in any lane. When turning from a one-way road, make sure you move into the lane closest to the turn you are going to make well in advance of your turn.



Left Turn Lane Only

The only time a vehicle should enter the center lane is at a point where the vehicle will have time to slow down or stop in order to make a safe left turn maneuver.

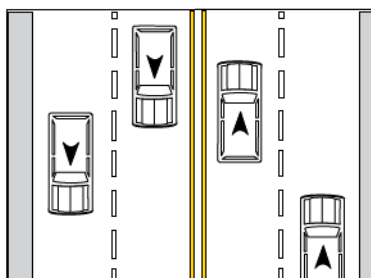


Left Turn Lane Only

Special Note:
The center lane should never be used for passing or as a through-traffic lane.

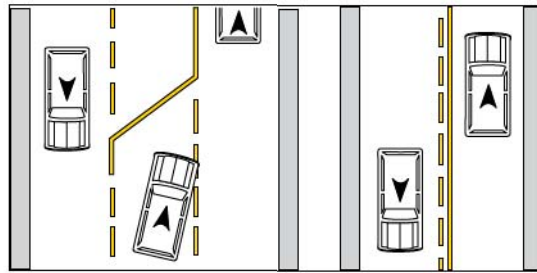
Multi-lane Highway (Four or More Lanes)

Do not cross the double yellow line to pass. Stay in your lane as much as possible. If you are driving slower, keep in the right-hand lane.



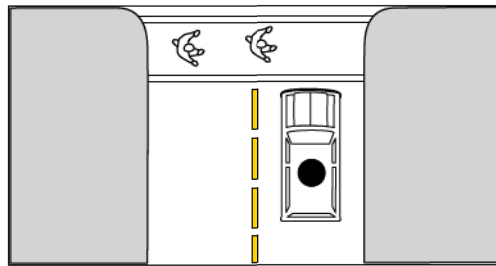
Solid and Broken Lines

A solid yellow line on your side of the road marks a “no-passing zone.” Broken or dashed lines permit you to pass or change lanes, if safe.



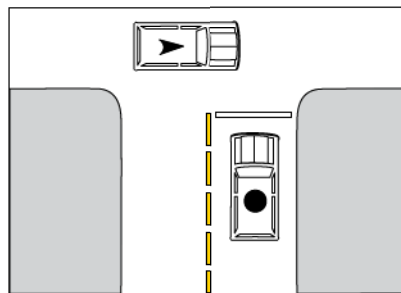
Crosswalks

White crosswalk lines are painted across a road to indicate pedestrian crossing areas. Pedestrians should use these areas when crossing the road. At intersections where stop lines are missing, you must stop before the crosswalk when required to stop by traffic signs, traffic signals, or pedestrians in the crosswalk.



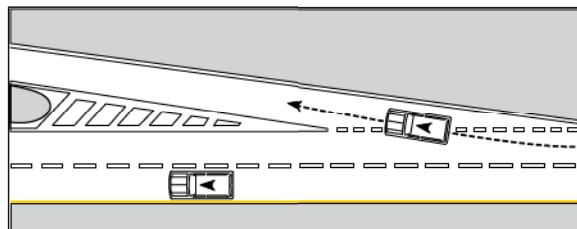
White Stop Lines

White stop lines are painted across the pavement lanes at traffic signs or signals. Where these lines are present, you are required to stop behind the stop line.



Solid Lines

Solid white lines are used for pavement edge lines, shoulder markings, channelizing, transitions, and lane use control. Crossing a solid white line should be avoided if possible. The solid yellow line on the left edge of the road is a guide for drivers to indicate driving to the left of the yellow line is prohibited. This type of yellow line can be found on interstate highways.

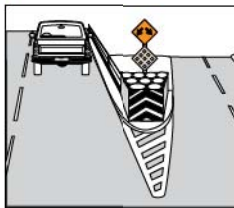


Crossing is prohibited where there is a pavement marking of double solid white lines.



Barrels

Barrels that are engineered to act as an impact cushion reduce the seriousness of crashes. These barrels are usually installed in front of a solid obstacle and in areas of high crash frequency.



Hearing Impaired

If you see this flag on the back of a bicycle, slow down, as the bicycle operator may be hearing impaired. This sign may also be displayed on vehicles to alert others the driver may be hearing impaired.



Construction and Maintenance Devices

Various traffic control devices are used in construction and maintenance work areas to direct drivers, bicyclists, or pedestrians safely through the work zone and to provide for the safety of the workers.

The most commonly used traffic control devices are signs, barricades, vertical panels, drums, cones, tubes, flashing arrow panels, and flag individuals. Orange is the basic color for these devices.

When you are in a construction and maintenance work area, be prepared:

1. To slow down or stop as you approach workers and equipment
2. To change lanes
3. For unexpected movements of workers and equipment

Special Note:
Traffic fines double for violations that occur in construction zones where workers are present.

Construction and Maintenance Signs

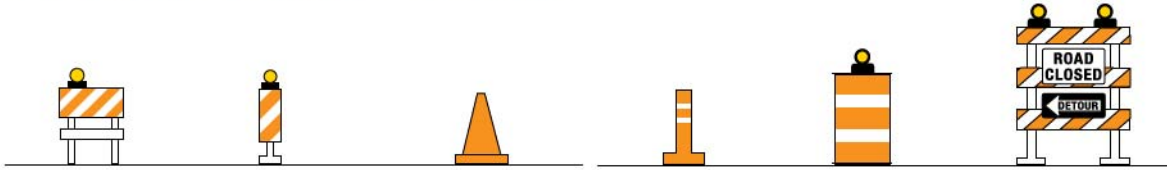
Construction and maintenance signs are used to alert drivers of unusual or potentially dangerous conditions in or near work areas. Most signs in work areas are diamond shaped, but a few are rectangular.

Table 23: Construction and Maintenance Signs

Sign	Sign	Sign	Sign

Channelizing Devices

Barricades, vertical panels, drums, cones, and tubes are the most commonly used devices to alert drivers of unusual or potentially dangerous conditions in highway and street work areas, and to guide drivers safely through the work zone. At night channelizing devices are often equipped with flashing or steady burn lights.



When you encounter any type of channelizing device:

1. Slow down and prepare to change lanes when it is safe to do so.
2. Be prepared for drivers who wait until the last second to move to the open lane.
3. Maintain reduced speed until you clear the construction area. There should be a sign indicating you are leaving the construction area.
4. Return to the normal driving lane only after checking traffic behind you.

Passing Traffic

The diagonal stripes on the barricade or vertical panel guide the driver towards the direction to where the traffic is to pass.



Pass to the Right

Stripes sloping downward to the right means the driver should bear to the right.



Pass to the Left

Stripes sloping downward to the left means the driver should bear to the left.

Flashing Arrow Panels

Large flashing or sequencing arrow panels may be used in work zones day and night to guide drivers into certain traffic lanes and to inform them part of the road ahead is closed.



Flag Person

A flag person is often provided in roadway work zones to stop, slow, or guide traffic safely through the area. A flag person wears an orange vest, shirt, or jacket and uses stop/slow paddles or red flags to direct traffic through work zones.

1. A flag person is used in cases of extreme hazard.
2. A flag person's instructions must be obeyed.
3. When instructed to stop, do so in your lane and do not veer right or left.
4. Do not attempt to go forward until the flag person instructs you to do so.
5. Proceed with caution, expect the unexpected.
6. Always be on the lookout for oncoming vehicles in your lane of traffic.



Automated Flagger Assistance Device (AFAD)

An automated flagger assistance device (AFAD) is used to control road users through temporary traffic zones. An AFAD is designed to be remotely operated, allowing a flag person to be positioned out of the lane of traffic.

Obey Warning Signs and Barricades

It is a violation to disobey the instructions, signals, warnings, or markings of a warning sign, or to drive around a barricade.

The offense is a misdemeanor punishable by a fine of \$1 to \$200. Fines double in a construction or maintenance work zone when workers are present.

The offense is a Class B misdemeanor punishable by a fine of up to \$2,000 and/or up to 180 days in jail when a warning sign or barricade has been placed at a location where water is over any portion of a road, street, or highway.

Slow-Moving Vehicle Emblem

This emblem is required for all slow-moving vehicles. Slow-moving vehicles are those designed to operate at a maximum speed of 25 mph or less, and the term includes all vehicles, farm and other machinery, and any other road machinery drawn by either animals or slow moving motor vehicles.

- a. The use of this emblem is prohibited on anything other than a slow-moving vehicle. It must not be used on other vehicles or on stationary objects.
- b. Exceptions. The following do not need the special emblem:
 - 1) A vehicle being used in actual construction work while traveling within the limits of a construction area marked as required by the Texas Transportation Commission;
 - 2) An implement or machinery being towed by a slow-moving vehicle bearing an emblem, if this emblem remains visible.

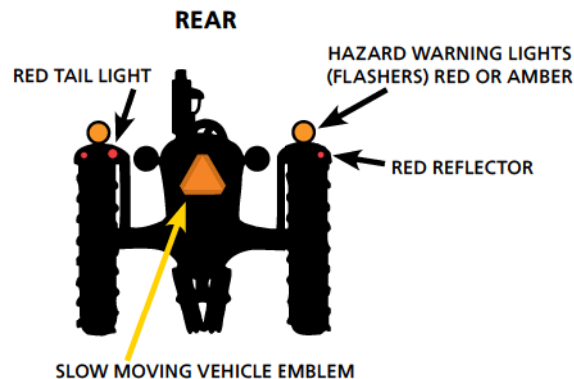


Image source: Some images in this chapter are courtesy of The MUTCD, 2009 Edition, published by FHWA at mutcd.fhwa.dot.gov/pdfs/2009/pdf_index.htm

Chapter 6: Signaling, Passing, and Turning

Signaling

A good driver always lets others know if he/she is going to turn or stop. Signaling communicates your intention when driving and helps other drivers around you to plan ahead. A surprise move often results in a crash. Always be alert, watch for others, and give signals for your movements.

Always signal when you are going to:

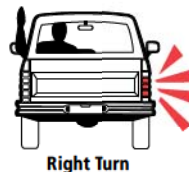
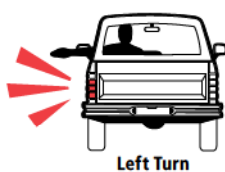
1. Change lanes
2. Make a turn
3. Pull away from a parking space parallel to the curb
4. Slow down or stop
5. Enter or leave a highway
6. Pull over to the side of the road

How to Signal

You may either use turn signal lights or hand and arm signals. If using hand signals, extend your hand and arm well out of the car window as shown below. Always make sure your signals can be easily seen by others, and signal in plenty of time.

Hand and arm signals are usually difficult to see during non-daylight hours, so it is important to make sure your signal lights are working properly. When signaling a stop, pump your brakes a few times to attract attention.

Signal continuously for at least 100 feet before turning or stopping, and be sure to turn off your signal lights once your turn is complete. Your unintended signal still means “turn” to other drivers.

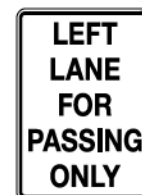


Passing

Keep to the Right

Never drive on the left side of the road when:

1. Pavement markings or signs prohibit driving on the left (a “No Passing Zone” or solid lane lines)
2. There are two or more traffic lanes in each direction
3. Within 100 feet of or crossing an intersection or railroad crossing
4. On a hill, curve, or any other place where vision is limited
5. Within 100 feet of a bridge, viaduct, or tunnel



Always keep to the right side of the road except when:

1. Passing another vehicle on a two- or three-lane street
2. Driving on a one-way street
3. The right side of the road is blocked

Basic Safety Rules When You Are Passing

It is not always safe to pass. Be patient and wait until the time is right. Crashes resulting from improper passing often result in head-on crashes and can be deadly.

1. Make certain the way is clear.
2. Give the proper signal before changing lanes.
3. Tap your horn when necessary to avoid surprising the driver ahead.
4. Avoid cutting in too quickly if you must return to your original lane.